No. 15123

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLEE'S BRIEF.

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Response to Appellants' Argument.

Decedent and Appellee were married from 1928 to 1946. Decedent's successor, the Administrator of his estate, has in this appeal, written by way of an opening brief and under the caption of "Argument", a lamentation, referred to as "laches" and "estoppel" with reference to the turbulent portions of the married life of the parties. Neither laches nor estoppel change the character of community property. Nowhere in the community property law is it related that married couples only, who did not fight with one another, accumulate community property. For married persons to accumulate community property, they need only be married, and the fact that

they may have had pre-marital sexual intercourse, and after the marriage fought, or threatened each other, misconducted themselves as to one another, or separated and become reconciled, doesn't change community property to separate property.

Appellee's Exhibit 2 in evidence shows that there were sweet honeyed periods of time as well in the marriage of the parties. Said exhibit under the signature of decedent is illuminating. Neither a long array of acts of connubial happiness nor connubial unhappiness would assist this Court whatsoever, in determining the nature of the property accumulated during the marriage.

But, Mrs. Sidebotham was an "unhappy wife", complain the Appellants, and her testimony before the trial court was inherently improbable, because she has insisted she was happy in her marriage to Decedent. An exposition of the inherent improbability of a female being happy with a blustering caveman egomaniac, may seem incredulous to counsel for Appellants, but the vagaries of the feminine heart and the reason she may not be happy but in fact "bored" by a sweet, kind, attentive husband, is a subject which the most profound students of psychology have never been able to determine.

Appellants claim that Appellee forfeited her right to her undivided interest in the community property or is estopped to claim that community property is community property is based upon the supposition that she was an adventurous in that she waited until he died, and then for the first time asserted her rights in and to the accumulated community property. Appellants assert that she further forfeited her right to her community interest in the property because she at one time, many years be-

fore his death, purportedly extorted an agreement out of him for 10% of a deal, and because she contemplated a divorce and deigned to write a letter to the Decedent's first divorced wife on the unspeakable subject of "alimony". Since alimony simply means "support and maintenance" to which either spouse may be entitled to receive under the law, its contemplation by a wife or husband, can hardly of itself place the label of "adventurous" upon said spouse, nor make the proposed solicitant thereof an unsavory character.

Appellants do not contend however, nor did the evidence show, that the Decedent ever did in fact pay Appellee any alimony, in over 20 years of the marriage. Appellants further do not contend, nor did the evidence show, that Appellee ever succeeded in getting 10% or any percent whatever, of any deal which Decedent may have made with her.

Appellants have further claimed in their opening brief under their caption of "Argument" that Appellee is estopped from asserting her property rights because she could never have been misled by her deceased husband, and that accordingly she ought to have known that he had his money and property hidden, because she was not ignorant of Court proceedings and property settlements in that she had once sued him for separate maintenance in the year 1932. It is submitted that one brief judicial experience could hardly have qualified her to become an expert on legal matters or the discovery of hidden assets. Nor would the fact that she wrote a letter in the year 1932, to her husband's former wife, in which she very properly inquired as to whether said former wife was being paid alimony, place her into the classification of a

conniving, avaricious spouse. The payment of alimony to another woman is always a source of slight discomfiture to the spouse of a husband who is burdened with such type of "fixed charge"! The inquiry made was a natural one which the ordinary reasonable woman would be wont to make.

The contents of said letter (App. Br. p. 9) in no manner qualified her as a person who was an expert on provisos contained in settlement agreements often times proposed by "hard bargainers".

Appellants further contend in their opening brief that Appellee was acquainted with "business affairs". The evidence is, that she knew shortly after she married her husband and some 10 to 15 years before he died, that her husband had 4 offices, that she knew how to answer the telephone, at one of said offices, knew how to open envelopes, address envelopes and put stamps on said envelopes. In many modern offices these duties are handled by automatic machines without "brains" and the fact that Appellee knew how to do these things didn't qualify her as an expert in the business affairs of her husband.

Appellants further contend that since under the same caption of "Argument" that Appellee, preferred to be "employed" when she could find employment rather than starve, that she being "employed" implied extra intelligence and proved that she could have discovered that the decedent later owned a parcel of real estate in San Francisco, inclusive of the fact that decedent was a registered Democrat. The evidence showed that Appellee was employed for a period of time as a real estate saleslady. Nothing in the nature of her duties, which was to contact prospective buyers of real estate, ever required

her to search official records. Appellant's counsel carefully refrained from questioning Appellee as to whether she knew where such records could in fact be found or located.

Since the Appellee was not a judgment creditor of the decedent, and under the state of the record prior to the institution of the case at bar, said decedent ostensibly owed her nothing, excepting the sum of $100.00, there was no legal requirement that she exercise diligence in locating such assets as he might possess. To what avail would she be required to learn that in 1950 the decedent acquired a parcel of real estate in San Francisco, and that it appeared on the tax rolls in his name, when she herself had divorced the decedent in 1946, without she having sought any alimony nor know that he had accumulated obviously concealed assets prior thereto!

How would the fact that the decedent was a registered voter in San Francisco from 1942 to 1950, be indicative that he was concealing monies under names other than his true name, and other than the name he used as a registered voter prior to the date that Appellee divorced him, and continued to conceal the same under aliases thereafter? How would the fact that there was a telephone, in someone else's name at the address where he registered as a voter, from 1945 to 1950, place Appellee upon the trial of hidden assets or constitute suspicious circumstance pointing to the fact that decedent had been hiding assets from her as of prior to the year 1946? She was not a judgment creditor.

Tracing of Assets.

Appellants have contended that the evidence was insufficient to support the findings of the lower court, that there was community property of the parties in existence prior to the year 1946 (pp. 17-19).

Appellants have failed utterly to point out by any reference to the evidence, wherein the same was insufficient to support the findings or what illegal inferences were drawn therefrom by the trial court.

Appellants devoted less than two pages of argument in their brief, to this point (pp. 17-19) and have sought to cast the burden upon the Appellate Court, to search the record, with a fine tooth comb in order to come up with specifications wherein and whereby the trial court must have, as a matter of law drawn improper inferences, or considered nonapplicable presumptions or ignored the obvious. None of this labor has been performed by Appellants, or else if the same has been done, it has not been made a part of Appellants' brief for lack of merit.

Was Evidence Inherently Improbable?

Appellants have argued on two pages (19-21) of their brief that the decision of the trial court, ought be reversed, because of the "obvious falsity and inherent improbability of plaintiff's case".

Since the case as such cannot be false or inherently improbable, in view of the sweeping statement or claim of Appellants, we have searched said two pages to ascertain what specific portions of the transcript of the evidence, are referred to, which are obviously false and inherently improbable.

There is no inherently improbable testimony as the term is known is law, excepting the argument that Appellants themselves didn't believe the evidence given by Appellee concerning her "reliance" upon the representations made to her by Decedent that he was "broke" and "had a hard time."

The province of the "trial court" relative to whether a witness is "credible", and if credible the extent and "weight" to be given his testimony, is never invaded by the Appellate Tribunal, and therefore not a proper point for appeal. Nor does the label which Appellants wish to place upon the argument that the testimony is "inherently improbable", change the rule that the question of credibility and credulity rests entirely within the discretion of the trial court, unless in fact the evidence is inherently improbable and the trial court arbitrarily, and capriciously, and whimsically, has abused its discretion.

A search of said two pages for specifications of and concerning the arbitrary exercise of power, and how and in what manner the trial court was capricious and whimsical, in giving probative value to scientifically or legally inherently improbable evidence, fails to divulge any such specifications.

The Law.

Under subheading I of "The Law" at page 22 of their opening brief, Appellants have made reference to a prior decision of this Honorable Appellate Court, wherein it was held that Appellee in her pleadings in the case at bar had stated a cause of action against Appellants. Appellants state in substance, that said Appellate Court's decision doesn't mean anything in the case at bar, because the lower court tried the case on evidence which was com-

pletely different from the allegations of the pleadings. Appellants however do not support their conclusion by reference to the evidence which supports said contention. Throughout the course of the trial and in the Reporter's Transcript of the evidence, not a single objection appears to the effect that any proof was offered at variance with the pleadings.

A further contention made by Appellants in their opening brief, is that the Appellee failed to prove that the property possessed by decedent when he died, was the same property he had in 1946, and under subheading II, from pages 23-27, quote law upon the subject. Appellee has no quarrel with Appellants concerning law which may apply, but it is a truism that the "facts" control what law may become applicable.

When the trial court found affirmatively and upon evidence duly introduced and received that the property found in the possession of decedent at the time of his death, had been acquired by him prior to the year 1947, during his marriage with Appellee, any rebuttable presumption to the contrary set at rest the contention raised on appeal that in view of the fact that more than four years had lapsed thereafter, the decedent's property had thereby converted into his separate property.

The administrator of Appellant Estate, according to the evidence, had retained the services of William Dolge and Company, licensed accountants and investigators, to reconstruct the books of account of the decedent subsequent to the year 1946, and the results of that investigation as hereinafter indicated were available to Appellants for presentation into evidence.

Mr. Trowbridge, attorney for the Appellant, was vehement in his opposition to the introduction of such evi-

dence at the trial. Appellee's effort to place into evidence that decedent accumulated no material or substantial assets subsequent to 1946 was thus obstructed [Clk. Tr. pp. 204-206]. The attorney for Appellants, Mr. Trowbridge, refused to allow said Investigator to testify at the time of the trial, on the grounds that the results of the labors made by said investigators concerning what decedent may have accumulated after 1946, constituted privileged communications.

May Appellants now on this appeal, be permitted to take advantage of the alleged omission of the very evidence which they themselves caused to be excluded from evidence at the time of trial?

When evidence is hidden and not produced by the party who has the same in his control, can said party avert the consequences of his own deliberate act and complain, if the trial court concluded that said evidence, if produced, would have been adverse to said party, particularly if there was other evidence from which it could likewise be clearly inferred that the property on hand when the marriage was dissolved in 1946, was the same property or increase thereof that decedent had at time of his death?

In the California case of *White v. White,* 26 Cal. App. 2d 524, it was held that when a husband suppressed records in a matter involving a community property accounting with his wife, that he had to take the legal consequences of being unable to account satisfactorily therefore—and a presumption arose that the suppression, would have been adverse, if it had been produced.

The suppression of evidence was made evident during the examination of Mr. Frank J. Fontes, attorney for the estate, who had testified that William Dolge & Com-

pany, certified public accountants, had been retained to make an investigation of the assets of decedent [Rep. Tr. p. 159, *infra, et seq.*]:

> "Q. Now, on the question of the time when the monies which went to make up the assets of the decedent, were accumulated, did William Dolge & Company, certified public accountants, render a report to you. A. Yes.
>
> Q. Do you have that report with you? A. I had a copy.
>
> Q. May I see the copy? A. I think I delivered that to Mr. Trowbridge.
>
> Mr. Trowbridge: Yes, I have it here, and it is addressed to me. I think it is a privileged communication that counsel is not entitled to."

Continuing with Mr. Fontes testimony, the following occurred [Rep. Tr. p. 162]:

> "Q. As administrator of the estate, have you any evidence that the decedent did file a report wherein he reported income received or earned by him for the years 1946 to the date up to and including the year 1950? A. Not for 1946, or anything after that. . . ."

The trial court drew proper and logical inferences, from the evidence, concerning when the property may have been accumulated by Decedent. Thus, the bills found in decedent's safety deposit box in 1951, were alongside other papers, assets, stock certificates, and savings bonds which bore dates prior to 1946 and as early as the year 1932, and had obviously been acquired by the decedent during the marriage with Appellee [see Memo. opinion, Rep. Tr. p. 37, for references to other portions of the evidence and which appears as findings of fact].

The Decree of Heirship.

Appellants have claimed that a decree of the Probate Court dated December 14, 1953, to establish heirship, under Probate Code, Section 1088, constitutes *res adjudicata* of the rights of the Appellee in the case at bar and that therefore, there was nothing left for the district court below, to pass on. An examination of said decree shows that said decree went no further than to adjudicate who are the legal heirs of the decedent, and entitled to distribution [Rep. Tr. pp. 64-65]. It was never claimed in this action before the district court below by the Appellee, that she is the widow of the decedent, nor has it ever been claimed herein, that Appellee is an heir or a legatee of the Decedent. Nor is it claimed by Appellee that she is entitled to a decree of distribution from the estate. Appellee at one time had two matters pending in the Superior Court at the same time, to-wit: the case at bar, later moved to the Federal Court, and the petition in probate referred to by Appellants. Both however proceeded on a different basis and of and concerning a different subject matter. The said Petition in Probate involved the question of succession, all of which subject matter is not involved whatsoever in the case at bar. Appellee at one time mistakenly made a petition under Probate Code, Section 1080, before the State Probate Court in the capacity of distributee, which capacity is to be distinguished from the capacity of Appellee in the case at bar. The classification of subject matter and the parties in said separate proceedings are and were never the same. Appellee, upon having ascertained that she was not legally an heir, therefore abandoned her petition under Probate Code, Section 1080, before said Probate Court, and did not press it further. She was

not present in Court nor was there ever a trial of said disconnected issue on the merits. The probate decree went no further than simply establish heirship, and denied Appellee's petition for distribution as an heir. The finding by the Probate Court that Appellee was not an heir was not only a true fact, but likewise is consistent with her acclaimed status and position in the case at bar, to-wit: that she was by virtue of prior divorce, a stranger to the decedent and his estate. The two proceedings were inconsistent, nor does the principle of *res adjudicata* apply.

For Appellants to assert that the issues involved in the "heirship proceedings" [the petition therein of Appellee was three pages long, Rep. Tr. pp. 61-63] are substantially the same as the issues involved in the action at bar [complaint of Appellee was fourteen pages long, Rep. Tr. pp. 3-16] in which latter action Appellee made the Public Administrator an adverse party defendant, instead of being in privity with said Administrator as in the former Petition, concerns another matter. To assert they are the same is to ignore or fail to understand the fundamentally different nature of said proceedings which pursue entirely different objectives, and constitute different classes of cases, as well as treat of different subject matters.

In the case of *Schlyen v. Schlyen,* 43 Cal. 2d 361, cited by Appellants in support of the argument that the Probate Court had jurisdiction to decide under Probate Code, Section 1080, adverse title to property in course of administration, was a case, the effect of which was argued before the trial court, and said trial court specifically disagreed, even as this Appellate Court will disagree, with the interpretation placed thereon by Appellants. See memorandum opinion [Rep. Tr. pp. 39-40]. In the

Schlyen case the probate jurisdiction of the Superior Court did not try the issues, but instead, the issues were tried by the Superior Court sitting in the exercise of its general equity jurisdiction, even as in the case at bar, which case was moved for trial upon motion of the Appellants to the United States District Court.

The *Schlyen* case involved the rights of parties in privity with the estate, and did not involve the rights of third party strangers. It stated that matters which may be tried in Probate Court, may be tried in a court of general jurisdiction, by waiver, but that matters which must be tried in a court of general jurisdiction, and not prohibited to the Probate Court, or Superior Court sitting in probate, such as claims of title between the estate and strangers, cannot be tried in a Probate Court or department.

Appellee, in said petition under Probate Code, Section 1080, which she later abandoned, stated in paragraph IV thereof [Rep. Tr. p. 62], that she was an "heir at law" of decedent. In paragraph VI thereof [Rep. Tr. p. 63] petitioner said she was entitled to the property by virtue of the "death" of decedent.

Appellants assertion that the same issues were involved in the heirship proceedings and in the case at bar, are accordingly incorrect, since heirship or distribution is not involved whatsoever in the case at bar.

> The only parties who may be classified as aggrieved parties in an heirship proceedings are legatees and devisees styled "claimants" Probate code section 1080. No issue can be raised in the proceedings by another.
>
> *Estate of Lynn,* 109 Cal. App. 2d 468, 494.

It is a special proceedings for those who claim in privity with the estate only.

Estate of Dodge, 9 Cal. App. 2d 650.

The Probate Court is without jurisdiction to try title to property as between a representative of the estate and a stranger thereto.

Wilson v. Superior Court, 101 Cal. App. 2d 592.

Since therefore, the issues and subject matter, and the parties, in the case at bar, are totally different than those under the petition to determine heirship at one time filed and abandoned by Appellee, the rules concerning *res adjudicata* are not involved.

It is interesting to note that the petition in probate, referred to by Appellants and the complaint originally filed by Appellee in the case at bar, which was removed to the United States District Court, and being the instant case on appeal, were pending in the Superior Court of San Francisco at the same time. The actions covered different subject matters, and were not subject to consolidation.

The District Court Considered the Wyoming Decree Void.

The Wyoming decree procured by decedent November 2, 1942, did not purport to dispose of any property rights between the spouses, and therefore decided nothing concerning the same.

The matrimonial domicile of the parties was the State of California. Appellee did not participate therein, know about the same, or file an appearance therein. The evidence was clear that the parties after their marriage in 1928, lived in the State of California, and lived in no other state, as husband and wife; and that the decedent

was living separate and apart from appellee, without her fault, at the time that he procured said Wyoming decree, on substituted service.

The evidence was uncontradicted, that when the decedent procured his divorce in Wyoming, he stated under oath, that the residence of the appellee was

> "unknown and cannot, with reasonable diligence be ascertained."

He therefore committed a fraud upon the Wyoming Court, and upon the appellee, his wife. The testimony of the witness Mr. Scardino [Rep. Tr. p. 206, *et al.*], whose parents owned the hotel where the plaintiff resided in San Francisco, and where decedent had been visiting her in the year 1940, and paid the rent, corroborated plaintiff's testimony to the same effect.

[The decree of divorce, Deft. Ex. E, shows that it was procured on November 2, 1940, not as stated by appellants on November 2, 1942.]

Obviously the very heart of the affidavit in support of substituted service, was predicated upon the fragrantly fraudulent misrepresentation to the Wyoming Court, that she could not be notified in that he did not know where she resided.

California Courts refuse to recognize such type of foreign decree, when the status of its own residents, are involved.

> A decree of divorce rendered by a sister state which did not have personal jurisdiction of the defendant, and which was not the state where the parties last lived together as husband and wife, is not entitled to full faith and credit.
>
> *Delonoy v. Delonoy,* 216 Cal. 27.

A fraud committed against the state granting the divorce makes the decree invalid.

Overstein v. Overstein, 228 S. W. 2d 615.

When a false affidavit is presented to the Court for the purpose of obtaining an order for publication, this, of itself, is an act of fraud both upon the Court and the defendant in the action, and any judgment based thereon will be set aside at the defendant's instance.

Stern v. Judson, 163 Cal. 726;

Doyle v. Hampton, 159 Cal. 729;

Williams v. Williams, 57 Cal. App. 36.

The *Davis v. Johnson,* 144 F. 2d 862 case, cited by Appellant, under the heading that the District Court erred in not giving full faith and credit to the Wyoming decree, is a case wherein upon a petition for writ of habeas corpus, the petitioner tried to question for the second time, a factual issue of jurisdiction, wherein he had been a defendant in a criminal action, and had been found guilty and sentenced to Alcatraz. Appellee believes that this authority cited by Appellant, was unintentional as Appellants must have had another rule of law for some other purpose in mind.

The *Jones Truck Co. v. Superior Oil Co.* case, cited by Appellant (234 P. 2d 802), is likewise out of context with the point for which it was offered. A summons on an action, on a promissory note, was left with the defendant's wife at "his usual place of residence", which is specifically provided for by Section 3-1009 of the Wyo. Comp. St. 1945. The Sheriff made a defective return. The Court held that it was the fact of service and not the proof of service that conferred jurisdiction. The

Court made it clear that there was a distinction between a defective service of process from what would constitute lack of service.

Nor do the other cases cited by Appellant change the fundamental rule above stated by Appellee. Thus, the case of *Clarke v. Shoshoni Lumber Co.,* 224 Pac. 845, which Appellant refers to as being similar to the facts in the case at bar, is very dissimilar. No issue whatsoever was made in said Wyoming case, nor was it claimed that any fraudulent or untruthful statement was ever made to the Court, as in the case at bar. Said Wyoming case does not involve a divorce, or a case wherein the *res* and the defendant were outside of the State of Wyoming. as in the case at bar, but involved a default judgment against an "unknown" holder of bonds, in connection with a lien foreclosure. Said Wyoming case involved a motion to "vacate a default judgment" by one Ella R. Clarke, who made a general appearance to do so. The Court held upon conflicting affidavits that she had had *actual notice* of the action within three years from the date of judgment and therefore had lost her right to open said judgment, under the provisions of Section 5924, Wyo. C. S. 1920.

The *Hume v. Ricketts* case, 240 P. 2d 881, cited by Appellant, simply repeats, the general doctrine that an attack upon a Judgment by the defendant in an action on the judgment is generally regarded as a collateral attack, and when absence of jurisdiction over the parties does not appear on the record a collateral attack should not be permitted. The case involved revivor of a judgment wherein the parties had personally litigated the same on the merits.

It was not a divorce judgment where the *res* was without the Court's jurisdiction, or one wherein the defendant had not appeared, as in the case at bar.

Constructive service was had in said revivor action. The judgment debtor attempted to avoid the binding effect of the judgment on the grounds that he ought to have been personally served. The Court held that he could be constructively served. It was never contended that any fraud had been perpetrated on the Wyoming Court or on the attacking party, as appellee has urged in the case at bar.

Laches and Estoppel.

Appellants have claimed in their opening brief, chapter V, page 37, that the lower court erred in not holding that her action was barred both by laches and by the doctrine of equitable estoppel.

It is claimed in Appellants' Opening Brief, that the case of *Champion v. Wood,* 79 Cal. 17, is decisive, Appellants have asserted that from a studied analysis of the same, that the "facts . . . are parallel to those in the present case . . ." Appellants further claim that the opinion of the state court "is particularly strong . . . because it was decided that the complaint was insufficient as against a general demurrer."

Appellee must therefore hasten, to add, in response thereto, that the complaint of appellee has already been held sufficient as against the objections thereto by Appellants, by direction of this Honorable Court. An excellent discussion of the law, and particular references to the facts pleaded in the case at bar, appears in a decision of the

Ninth Circuit Court of Appeals, and reported at 216 F. 2d 816, which is subject to the judicial notice of this Court.

An examination of the *Champion v. Wood* case, cited by Appellants indicates that the facts are dissimilar, and with due respect to Appellants' claim, the applicable law does not appertain.

In said case, a wife inserted in her complaint for divorce, that there was no common property, by reason of certain false and fraudulent representations of her husband. Her husband told her that all of the property acquired by him since their marriage was his sole and separate property, and that she believed him. This was a misrepresentation of law, decided the court. None of the facts of the actual existence of property were concealed from the wife, and the wife in fact had knowledge of the existence of the property acquired during the marriage.

Said the Court:

> "It is not claimed in the complaint that any misrepresentations were made as to the amount of property which had been acquired during the marriage. They were misrepresentations as to the rights of the parties with respect to the property,—misrepresentations of law."

The extent of the property was therefore known by both parties, and the subject matter open to the inspection and available to both of them.

In the case at bar, Appellee did not know of the existence of the property or subject matter, and the active concealment of its very existence by the decedent caused her to "discover that it existed" by the accident of decedent's death. Any consultation prior to the discovery

of the concealed assets, with a lawyer, under the facts of the case, would not have led to anything, unless the lawyer had associated with him a clairvoyant who could see what an ordinary human being was incapable of seeing!

The case of *Tarien v. Phil C. Katz,* 216 Cal. 554, is more similar to the case at bar than the *Champion* case (*supra*). The decedent was a gambler. His wife had divorced him. When he died property was found in his possession. She claimed the property was formerly community property and the Court awarded her one-half of the property, because they became tenants in common. The Attorneys for Mr. Katz, the public administrator, attempted to interpose the defense of laches, and failed because said the Court at page 559, *infra*:

> "There was no evidence that the wife knew where the common property could be found."

Miscellaneous Rulings on Evidence.

The witness Mr. Daniel J. Byrne, manager of the safe deposit vaults, Savings Union Branch, American Trust Company, identified certain safe deposit rental or lease agreements, which constituted bank records, of and concerning the safety box held under the name of W. H. Towner. The original safety deposit box was opened on January 9, 1943 and was thereafter continuously carried under the same name until the death of the decedent in 1951.

Although Appellants do not contend that the decedent Robert Sidebotham was a person other than the same Mr. W. H. Towner who had maintained said safety deposit boxes commencing January 9, 1943, up to the time

of his death, they claim that this matter was established by hearsay, was immaterial and incompetent evidence and that no proper foundation was laid which would qualify Mr. Bryne, to identify the admissibility of the records. That accordingly, the District Court committed error, in refusing to strike said evidence, upon motion of Appellants.

An examination of the Reporter's Transcript shows that the evidence was properly admitted and the objections interposed by Appellants are without substance.

Appellants' objections (a) and (b), pages 42-43, without showing of any prejudice suffered by the admissibility of said evidence [Pltf. Exs. 6-7] assert that one Mr. Byrne was not qualified to identify certain records which had been turned over to him in the year 1944, as manager of the safe deposit vaults of the American Trust Company successor to the Security Safety Deposit Company.

Mr. Byrne however testified that he was the manager of the safety deposit vaults of the American Trust Company [Rep. Tr. IV, p. 129, lines 31-32]. That he had supervision of the safety deposit vaults, which boxes had records of the persons who rented them. That he brought the records with him and they were records he maintained under his supervision [Rep. Tr. p. 130]. That he had been employed at the bank for 43 years [Rep. Tr. p. 131, lines 31-32]. That he had personally seen Mr. Towner and had "waited on him quite a bit" [Rep. Tr. p. 141, lines 24-25]. That a young man by the name of Sidebotham had gone to him, showed him a picture of the decedent Sidebotham.

"Q. Did he say that was his father's photograph?
A. Yes.

Q. And this photograph was the same man that had been signing under the name of Towner? A. That is correct.

Q. And the one that you had always been seeing there? A. Yes." [Rep. Tr. p. 142, *infra*].

The witness then stated that Mr. Katz (decedent's administrator) took the contents of the box and that it was examined by the "Inheritance Tax Man."

The evidence is clear that the safety deposit boxes taken out or rented by the decedent after September 8, 1944 [Rep. Tr. p. 128, line 32] were boxes under the control and supervision of this witness. He testified that he made a list of the number of times the decedent entered his boxes since 1944 up until "he passed away" [Rep. Tr. p. 145, lines 1-11].

Prior to the time that Mr. Towner (the decedent Sidebotham) had rented a safety deposit box at the American Trust Company, in the department under the charge and supervision of Mr. Byrne, he had rented a safety deposit box which bore number 1861 on January 9, 1943 from the Security Safe Deposit Company located at 26 O'Farrell Street. On April 24, 1944, he extended the rental on the identical box [Rep. Tr. p. 135, lines 1-12]. All of the assets of said bank were taken over by the American Trust Company, including the safety deposit boxes, on September 8, 1944, as well as the official bank records pertaining to said safety deposit boxes [Rep. Tr. p. 129, lines 1-8]. The same vault number was continued as it had been under the prior bank when Mr. Byrne took charge [Rep. Tr. p. 130, lines 1-20] on September 8, 1944. This occurred more than seven years before Mr. Sidebotham died in the month of December 1951.

Appellants' objection (c), page 45, identification of the signature of Mr. Jones on Plaintiffs' Exhibit 6, and identified as the man who "ran that vault" prior to the time that Mr. Byrne did, is an objection without any prejudicial consequence.

Appellants' objection (e), page 46, of Appellants' Opening Brief refers to the card signed by decedent which identified W. H. Towner as the renter of safety deposit box A-1917 [Rep. Tr. p. 140] on The Savings Union office, of the American Trust Company [Rep. Tr. p. 140, lines 13-32; Pltf. Ex. 9]. Since Mr. Byrne was the manager of the safety deposit vaults of the American Trust Company, and had supervision of the same, and the records of the persons who rented them, the "running objection" made on the record no longer could or did apply to the admissibility of this admissible evidence. The personal representative of the decedent testified that $64,770.00 in currency was taken out of the safety deposit box in the American Trust Company, and constituted part of the inventory of the Estate [Rep. Tr. p. 152, lines 25-30].

Appellants' objection (f) of Appellants' Opening Brief referred to evidence which was admitted by the Court as constituting part of the decedents inventory and the Court properly admitted it for that purpose [Rep. Tr. p. 173, lines 28-32].

Appellants' objection (g) of Appellants' Opening Brief concerns a registered letter which appears in a petition for instructions filed by the personal representative of the decedent on April 21, 1953 of and concerning a copy of an Internal Revenue Report [Rep. Tr. p. 161, lines 26-32]. Mr. Fontes, Attorney for the personal representa-

tive of the decedent, in charge of administering the assets of the decedent [Rep. Tr. p. 149, lines 26-32] testified that he had no evidence to show that a declaration of the receipt of income had been made by the decedent for the years 1946 to 1950 [Rep. Tr. p. 162, lines 8-15]. He further testified that William Dolge & Company was paid $1500.00 to ascertain whether decedents assets were accumulated after 1946 [Rep. Tr. p. 160, lines 26-32].

> "Q. Is it not a fact that on February 11th, 1953, you petitioned for instructions to incur expenditures for the specific purpose of investigating when Mr. Sidebotham earned or received monies. A. We did file petitions on more than one occasion." [Rep. Tr. p. 157].

See also [Rep. Tr. p. 212, lines 9-24].

As heretofore related the evidenced marshaled by these investigators was suppressed by Appellants at the trial of the action.

Appellants objected to the admissibility of Plaintiffs' Exhibit 12. Said exhibit indicates that the Bureau of Internal Revenue, had taken an administrative step based upon the same actual facts which were developed in evidence. Under the state of the evidence the Court presumed that by not making any income tax reports between 1946 through 1950, the decedent obeyed the law; that he didn't make any more income than the Administrator of the decedents estate reported. The Administrator asked for authority to contest the claim of the Government, that the decedent had made more income than reported, and thereby appeared on record asserting that the decedent had obeyed the law and had not committed a crime. Said evidence was pertinent, particularly

since Appellants stipulated that decedent had been active on oil and gas lease transactions before the year 1946 from which he could have derived income [Rep. Tr. p. 224, lines 17-23]. The evidence showed that the decedent had engaged in business activities before 1946, but there was an absence of evidence as to whether he had engaged in business activities after the year 1946.

Appeal From Lower Court's Refusal to Allow Expenses of Defense.

Application for allowance of attorneys fees and expenses of counsel and the administrator of the decedent's estate, was denied by the lower court, and an appeal has been taken therefrom. Appellee will consider the same as an adjunct hereto, without the filing of an independent and separate booklet, since it is felt that the same may be summarily disposed of.

The objections made by Appellee against the reimbursement of the legal expenses which appear at page 54 of the Reporter's Transcript, concerns a matter which ought to be covered in the phase of the case concerning the taxing of costs against the party who may ultimately lose the case and not by this appellate tribunal.

As to the attorney's fees, Appellee argued that most of the services rendered by the attorney's in connection with the case at bar had theretofore been paid for upon application to the Probate Court, for the same, excepting such proportion as might strictly be applied to the trial of the action in the Court below. The nature of the argument against the granting of the same, was a matter which was collateral to the case in chief, and no counter-affidavit was filed by Appellee.

The lower court accordingly, thought it best, that the same be disposed of by the Probate Court, which Court had all of the facts before it, and which facts were not offered into evidence by either of the parties in the pending litigation.

Wherefore Appellee, prays that the judgment of the lower court be affirmed.

MANUEL RUIZ, JR.,
Attorney for Appellee,
Helene Marceau Sidebotham.